Australian Government Solicitor *the leading lawyers to government*

Litigation notes

Number 19 | 28 October 2009

VALIDITY OF TAX BONUS PAYMENTS UPHELD: THE COMMONWEALTH'S POWER TO SPEND

The High Court in a 4:3 decision upheld the validity of the *Tax Bonus for Working Australians Act (No 2) 2009* (Cth) as a law incidental to the exercise of the executive power to spend, relying on ss 51(xxxix) and 61 of the Constitution.

The judgments address the constitutional provisions governing appropriation and expenditure by the Commonwealth and are of general significance for the Commonwealth's spending programs and the scope of its executive power.

Pape v Commissioner of Taxation & Commonwealth
High Court of Australia, 3 April 2009 (orders) and 7 July 2009 (reasons)
[2009] HCA 23; (2009) 83 ALJR 765; (2009) 257 ALR 1

Legislation

The *Tax Bonus for Working Australians Act (No 2) 2009* (Cth) (Tax Bonus Act) provided for the payment of a 'tax bonus' to Australian resident individuals who had an adjusted tax liability for the 2007–08 income year that was greater than nil, whose taxable income did not exceed $100,000 and who had lodged a tax return (s 5). The amount of the tax bonus varied, according to a person's taxable income, from $250 up to $900 (s 6). The Commissioner of Taxation was required to pay the tax bonus to those he was satisfied were entitled to it (s 7) and provision was made for recovery of overpayments (s 8) and interest on overpayment debts (s 9).

The purpose of these one-off payments was to respond to a global recession that had led to a crisis in economic affairs by providing an 'immediate economic stimulus to boost demand and support jobs' ([1], [3], [142]).

This issue

David Bennett QC
Deputy Government Solicitor
T *02 6253 7063* ***F*** *02 6253 7303*
david.bennett@ags.gov.au

Kathryn Graham
Senior General Counsel
T *02 6253 7167* ***F*** *02 6253 7304*
kathryn.graham@ags.gov.au

Sacha Moran
Counsel
T *02 6253 7403* ***F*** *02 6253 7304*
sacha.moran@ags.gov.au

High Court proceedings

The plaintiff, Mr Pape, was entitled to receive a tax bonus of $250 under the Tax Bonus Act, which had been assented to on 18 February 2009. On 26 February 2009 he commenced proceedings in the High Court challenging the validity of the Act on the grounds that it was not supported by any head of Commonwealth legislative power and it failed to comply with the requirements in ss 81 and 83 of the Constitution concerning appropriations. The parties agreed to questions in a Special Case on which the Court heard argument on 30–31 March and 1 April 2009. The Special Case contained agreed facts about the global financial and economic crisis and its effect in Australia, including statements by international bodies and the Commonwealth Government ([12]–[33]). The Court pronounced its order on 3 April 2009 and published reasons on 7 July 2009.

By a 4:3 majority the Court upheld the validity of the Tax Bonus Act. The majority consisted of French CJ, together with a plurality judgment of Gummow, Crennan and Bell JJ. Hayne and Kiefel JJ decided that the Tax Bonus Act was valid if read down to bring it within the taxation power by only providing for payment to a person of an amount of tax bonus or a person's adjusted tax liability, whichever was the lesser. Heydon J would have held the Tax Bonus Act to be invalid.

Constitutional provisions

The central constitutional provisions discussed were ss 61 and 81.

The central constitutional provisions discussed were ss 61 and 81:

> **61 Executive power**
>
> The executive power of the Commonwealth is vested in the Queen and is exercisable by the Governor-General as the Queen's representative, and extends to the execution and maintenance of this Constitution, and of the laws of the Commonwealth.
>
> **81 Consolidated Revenue Fund**
>
> All revenues or moneys raised or received by the Executive Government of the Commonwealth shall form one Consolidated Revenue Fund, to be appropriated for the purposes of the Commonwealth in the manner and subject to the charges and liabilities imposed by this Constitution.

Also, the first sentence of s 83 of the Constitution reads 'No money shall be drawn from the Treasury of the Commonwealth except under appropriation made by law'.

Standing

The Commonwealth accepted that the plaintiff had standing to challenge the payment of the tax bonus to *him*. However, all members of the Court rejected the Commonwealth's submission that he did not have standing to seek a declaration that the Tax Bonus Act is invalid. This was because the determination of the validity of the Tax Bonus Act was a step in disposing of the 'matter' in federal jurisdiction that was constituted by the controversy over whether the payment of the tax bonus to which the plaintiff was entitled was unlawful ([52], [157], [401]).

However, it does not necessarily follow that a taxpayer would have standing to challenge tax laws that do not expose the taxpayer to a specific liability or obligation or to challenge spending arrangements that do not confer an entitlement on the taxpayer ([48]–[49], [156]).

Gummow, Crennan and Bell JJ ([155], [158]) supported this outcome as vindicating the rule of law under the Constitution (see also Hayne and

Kiefel JJ at [274] and Heydon J at [401]). Appropriately, the adjudication by the High Court of a constitutional issue of the kind involved here, not depending on facts peculiar to the plaintiff, 'acquires a permanent, larger, and general dimension' ([158]).

Commonwealth expenditure

The central issue raised by the plaintiff's challenge was the source and extent of the Commonwealth's power to spend money.

The central issue raised by the plaintiff's challenge was the source and extent of the Commonwealth's power to spend money.

The Commonwealth had long acted on the view that s 81 of the Constitution confers a substantive power to spend money 'for the purposes of the Commonwealth', independent of any other Commonwealth power. This view was supported by statements of some justices in earlier cases including the *Pharmaceutical Benefits Case* (*Attorney-General (Vict) v The Commonwealth* (1945) 71 CLR 237) and the *AAP Case* (*Victoria v The Commonwealth & Hayden* (1975) 134 CLR 338).

However, in *Pape v Commissioner of Taxation & Commonwealth*, all members of the Court rejected the proposition that s 81 itself confers a 'spending power' on the Commonwealth (French CJ at [111]; Gummow, Crennan and Bell JJ at [178], [184]–[185]; Hayne and Kiefel JJ at [292], [296]; and Heydon J at [607]). While ss 81 and 83 require an appropriation of Commonwealth moneys before executive expenditure is lawful, substantive power to spend needs to be found elsewhere, either in legislation enacted by the Parliament (under a head of legislative power) or in the Constitution itself. In this latter respect, the power to spend may arise from the executive power of the Commonwealth derived from s 61 of the Constitution.

The nature of an appropriation under sections 81 and 83

Sections 81 and 83 provide for parliamentary control of public money and its appropriation. Here, the requirements of ss 81 and 83 were satisfied, as s 16 of the *Taxation Administration Act 1953*, read in its ambulatory operation with s 3 of the Tax Bonus Act, appropriated the Consolidated Revenue Fund for the purpose of making the payments required by the Tax Bonus Act ([171], [173]). However, s 81 did not support the validity of the Tax Bonus Act.

Gummow, Crennan and Bell JJ made clear that an appropriation is a conferral of authority by the Parliament on the Executive to spend public moneys in the sense of authorising the drawing of moneys from the Treasury for the purpose stated in the appropriation. However, an appropriation does not confer power in relation to the subsequent exercise of that authority. That is, an appropriation 'is not by its own force the exercise of an executive or legislative power to achieve an objective which requires expenditure' ([176]–[177]).

Having concluded that s 81 is not the source of a spending power but is simply related to the need to appropriate funds received by the Commonwealth, Gummow, Crennan and Bell JJ rejected the plaintiff's submission that the phrase 'for the purposes of the Commonwealth' in s 81 operates as a constraint on the Parliament's capacity to appropriate by requiring that an appropriation be for a purpose for which the Parliament has power to make laws. In the *Pharmaceutical Benefits Case* and the *AAP Case*, these words had been considered by some justices to operate as words of constraint, limiting the purposes for which the (then understood) spending power of the Commonwealth could be exercised.

Gummow, Crennan and Bell JJ affirmed that it is for the Parliament 'to identify the degree of specificity with which the purpose of an appropriation is identified' ([197], citing *Combet v The Commonwealth* (2005) 224 CLR 494

at 577), which suggests that s 81 is not itself a criterion of legislative validity. They undertook a detailed consideration of Imperial and colonial history relating to the law and practice of appropriations, as well as the drafting history of ss 81 and 83, and concluded that the phrase 'for the purposes of the Commonwealth' does not operate as any real limitation on the purposes for which the Commonwealth Parliament may appropriate funds ([187]–[205]). Neither s 81 nor s 83 requires a link to a head of legislative power to support an appropriation ([185], [210]).

Hayne and Kiefel JJ agreed that s 81 does not confer a spending power. Rather, ss 81 and 83 provide for Parliament's permission to be given to the application by the Executive of amounts standing to the credit of the Consolidated Revenue Fund to the purpose or purposes described in the appropriation ([295]–[296]).

Hayne and Kiefel JJ did not need to decide whether the phrase 'for the purposes of the Commonwealth' operates as a limit on the matters for which Parliament may appropriate, in particular whether it encompasses *any* purpose determined by the Parliament to be a purpose of the Commonwealth ([290]). However, they said that 'asking whether a particular appropriation can be described as being for a purpose of the Commonwealth will seldom if ever yield an answer determinative of constitutional litigation in this Court'. Their Honours suggest that ordinarily it will be the ambit of the relevant legislative or executive power to spend which will be in issue, not the validity of the appropriation ([317]).

The power to spend, not being located in s 81 of the Constitution, must be found elsewhere.

French CJ appears to have taken the view that the words 'for the purposes of the Commonwealth' in s 81 do operate as a constraint on the purposes for which amounts may be *appropriated*, being limited to the purposes authorised by the Constitution (including s 61) or by statutes made under it ([53], [81], [113]).

The power to spend

The power to spend, not being located in s 81 of the Constitution, must be found elsewhere. The Court said that it can be found in legislation made under a Commonwealth head of legislative power or it can be found in the executive power under s 61 of the Constitution.

French CJ, together with Gummow, Crennan and Bell JJ, held that the power to spend money for the purposes of the Tax Bonus Act was, in the particular circumstances in which it was enacted, supported by the executive power under s 61. The Tax Bonus Act was then validly enacted under s 51(xxxix) of the Constitution as a law incidental to the execution of the executive power ([136], [213]).

Hayne and Kiefel JJ agreed that the executive power can support the expenditure of money by the Commonwealth. However, they concluded from the structure of the federation, including the division of responsibilities between the Commonwealth and the States, that the executive does not have power to spend money merely because it has been appropriated ([336]–[338], [357]). The executive power to spend is subject to the same limits as the executive power generally and did not support the expenditure in this case—other heads of power were available to deliver a fiscal stimulus ([355]).

The power to spend money for the purposes of the Tax Bonus Act was ... supported by the executive power ...

Scope of the executive power

The executive power of the Commonwealth in s 61 of the Constitution extends well beyond the prerogatives of the Crown ([126]–[127], [214]). According to Gummow, Crennan and Bell JJ, who took the widest view, the executive power:

> ... enables the undertaking of action appropriate to the position of the Commonwealth as a polity created by the Constitution and having regard to the spheres of responsibility vested in it.
>
> ... the phrase 'maintenance of this Constitution' in s 61 ... conveys the idea of the protection of the body politic or nation of Australia. [214]–[215]

They suggested that the only constraint which could operate on the executive government of the Commonwealth when considering its power, after appropriation by Parliament, of expenditure of moneys would be one derived from the position of the executive government of the States ([220]). However, in analysing any such constraint, it would be necessary to have regard to the 'comparative superiority of the Commonwealth in the federal structure' ([222]). Their Honours also referred to the judgment of Mason CJ, Deane and Gaudron JJ in *Davis v The Commonwealth* (1988) 166 CLR 70 (*Davis*) at 93–94, where it was said:

> The existence of Commonwealth executive power in areas beyond the express grants of legislative power will ordinarily be clearest where Commonwealth executive or legislative action involves no real competition with State executive or legislative competence. [239]

It may be difficult ... to conceive of situations where Commonwealth expenditure alone would give rise to competition with State executive or legislative competence ...

It may be difficult, then, to conceive of situations where Commonwealth expenditure alone would give rise to competition with State executive or legislative competence (see also the discussion of the taxation power at [240] and the earlier references to the views of Sir Robert Garran at [182] and [236]).

However, the judges in the majority did not find it necessary, in upholding the validity of the Tax Bonus Act, to describe the full extent or limits of the executive power (French CJ at [9], [126], Gummow, Crennan and Bell JJ at [227], [234], [241]), although they did express caution about the broad application of the executive power to support coercive laws absent authority under heads of power other than s 51(xxxix) ([10], [244]–[245]).

Gummow, Crennan and Bell JJ accepted (at [228]) as sufficient for supporting the validity of the Tax Bonus Act the formulation of Brennan J in *Davis* that:

> ... s 61 does confer on the Executive Government power 'to engage in enterprises and activities peculiarly adapted to the government of a nation and which cannot otherwise be carried on for the benefit of the nation' to repeat what Mason J said in the *AAP Case*. In my respectful opinion, that is an appropriate formulation of a criterion to determine whether an enterprise or activity lies within the executive power of the Commonwealth. [111]

They went on to caution that, while s 51(xxxix) authorises the Parliament to legislate in aid of the executive power, 'that does not mean that it may do so in aid of any subject which the Executive Government regards as of national interest and concern' ([228]). However, this comment appears to be related to the Commonwealth Parliament's power to legislate under s 51(xxxix), not its executive power to spend.

French CJ said that the executive power of the Commonwealth is not limited to statutory and prerogative powers and non-prerogative capacities. Importantly, the executive power 'has to be capable of serving the proper purposes of a national government' but:

> ... the exigencies of 'national government' cannot be invoked to set aside the distribution of the powers between Commonwealth and States and between the three branches of government for which this Constitution provides, nor to abrogate constitutional prohibitions ... there are broadly defined limits to the power which must be respected and applied case by case. [127] ...
>
> To say that the executive power extends to the short-term fiscal measures in question in this case does not equate it to a general power to manage the national economy. [133]

In explaining the proper purposes of a national government, French CJ referred to *Davis* and the comments of Brennan J and Mason CJ, Deane and Gaudron JJ quoted above ([131]). His Honour also said that it was 'difficult to see how the payment of moneys to taxpayers, as a short-term measure to meet an urgent national economic problem, is in any way an interference with the constitutional

distribution of powers' ([127]). Moreover, in the opening passages of his judgment, French CJ makes the following comments, which suggest a broad approach to the scope of the executive power in supporting expenditure:

> The constitutional support for expenditure for national purposes, by reference to the executive power, may arguably extend to a range of subject areas reflecting the established practice of the national government over many years, which may well have relied upon ss 81 and 83 as a source of substantive spending power. [9]

The Tax Bonus Act

The judges in the majority decided that, in the global and domestic economic circumstances disclosed on the facts of the case, the executive power extended to determining the need for an immediate fiscal stimulus. French CJ said:

The judges in the majority decided that ... the executive power extended to determining the need for an immediate fiscal stimulus.

> The executive power extends, in my opinion, to short-term fiscal measures to meet adverse economic conditions affecting the nation as a whole, where such measures are on their face peculiarly within the capacity and resources of the Commonwealth Government. [133]

For Gummow, Crennan and Bell JJ it was sufficient for the present case that there was a national emergency to which only the Commonwealth had the fiscal means of responding promptly ([241]). Their Honours said:

> It can hardly be doubted that the current financial and economic crisis concerns Australia as a nation. Determining that there is the need for an immediate fiscal stimulus to the national economy in the circumstances set out [at [230]–[231]] is somewhat analogous to determining a state of emergency in circumstances of a natural disaster. The Executive Government is the arm of government capable of and empowered to respond to a crisis be it war, natural disaster or a financial crisis on the scale here. This power has its roots in the executive power exercised in the United Kingdom up to the time of the adoption of the Constitution but in form today in Australia it is a power to act on behalf of the federal polity. [233]

Having decided that the executive power would support the expenditure of the money, it followed that the legislative power in s 51(xxxix) of the Constitution supported the enactment of legislation incidental to the effectuation of the fiscal stimulus policy by creating a right to receive the tax bonus and recover overpayments, and that the Tax Bonus Act was valid ([9], [134], [243], [245]).

The taxation power and reading down

All members of the Court, with the exception of French CJ, considered whether the Tax Bonus Act was a valid exercise of the taxation power in s 51(ii) of the Constitution. The Commonwealth's concession that the Tax Bonus Act could not be supported in its entirety as a law with respect to taxation (because in a significant number of cases the amount of the tax bonus would exceed the person's tax liability) was endorsed. It was not sufficient that the Tax Bonus Act used tax liability and taxable income as criteria for identifying tax bonus recipients and the size of their payments, as the Act did not actually alter taxation liabilities as such or provide for a rebate of tax payable ([255], [386]–[388], [453]).

However, Hayne and Kiefel JJ accepted the Commonwealth's submission that (if necessary) the Act was a valid exercise of the taxation power if it was read down under s 15A of the *Acts Interpretation Act 1901* (Cth) to provide for tax bonus payments that would not exceed the amount of a recipient's adjusted tax liability. Given the purpose of the Tax Bonus Act was to provide an urgent economic stimulus 'by putting money in the hands of the intended recipients quickly' it was not to be assumed that there was a legislative 'intention' that no payments at all be made unless all putative recipients could be paid the full amount of the bonus

specified in s 6 ([389]). In that operation of providing for repayment to certain taxpayers of some or all of the taxpayer's tax liability for the 2007–08 year, the Tax Bonus Act was a law with respect to taxation ([393]).

Gummow, Crennan and Bell JJ rejected the submission that (if necessary) the Act could have been read down, as they concluded this would involve the Court in impermissibly exercising legislative power in rewriting the law by reference to criteria not expressed in it ([251]).

Other powers

The Commonwealth also relied on other heads of power to support the validity of the Tax Bonus Act: s 51(i) (interstate and overseas trade and commerce power) and s 51(xxix) (external affairs power). The justices in the majority did not need to deal with these powers. Hayne, Kiefel and Heydon JJ held that these powers did not support the Tax Bonus Act.

AGS (Steve Webber and Peter Melican from the Canberra Office together with David Bennett QC from the Constitutional Litigation Unit) acted for the defendants with the Commonwealth Solicitor-General Stephen Gageler SC, Stephen Lloyd SC and Guy Aitken (from AGS) as counsel.

Text of the decision is available at:
http://www.austlii.edu.au/au/cases/cth/HCA/2009/23.html

THE AUSTRALIAN MILITARY COURT INVALID

The High Court unanimously held the recently established Australian Military Court (AMC) to be constitutionally invalid, on the basis that the AMC purported to exercise the judicial power of the Commonwealth but was not a court established in accordance with Chapter III of the Constitution.

Lane v Morrison
High Court of Australia, 26 August 2009
[2009] HCA 29; (2009) 83 ALJR 993; (2009) 258 ALR 404

Andrew Buckland
Senior Executive Lawyer
T *02 6253 7024* ***F*** *02 6253 7303*
andrew.buckland@ags.gov.au

Simon Thornton
Lawyer
T *02 6253 7287* ***F*** *02 6253 7303*
simon.thornton@ags.gov.au

Background

The military justice system in Australia

Prior to the establishment of the AMC on 1 October 2007, the military justice system in Australia relevantly consisted of individually-convened courts martial and Defence Force Magistrates.[1] Although such bodies operated in many respects like civilian courts trying criminal offences, and pronounced verdicts of guilt or innocence of offences (including in effect offences against the general criminal law) ([96]), their findings and punishments were subject to review within the Defence Force by 'reviewing authorities'. Furthermore:

> On review ... a conviction could be quashed, a new trial could be ordered, conviction for an alternative offence could be substituted, or in some cases the punishment imposed could be quashed.
>
> The grounds upon which a reviewing authority could exercise these powers were limited. The limits were expressed in terms very like those found in common form criminal appeal statutes. ([89]–[90], footnotes omitted)

A structure along these lines had existed from prior to federation and, until 1985 (when the *Defence Force Discipline Act 1982* (Cth) (DFDA) came into force), was based on English military law as picked up and applied in Australia ([38]–[45], [81]–[93]).

The AMC was established as a permanent 'court of record' to replace the previous system of trial by courts martial and Defence Force Magistrates. It consisted of 'military judges' who, although members of the Defence Force, were intended to be independent of the chain of command in the Defence Force ([95]). This was because the AMC was intended to 'satisfy the principles of impartiality and judicial independence' ([18]). The term of a military judge's appointment differed from that of judges of 'other federal courts created by the Parliament' (s 72 of the Constitution), and a note to the DFDA provided that the AMC 'is not a court for the purposes of Chapter III of the Constitution' ([70]).

Critically for this case, a punishment or order of the AMC took effect forthwith ([50]) and was not subject to review by officers within the chain of command (although an expanded right of appeal from decisions of the AMC to the Defence Force Discipline Appeals Tribunal was established).

Critically for this case, a punishment or order of the AMC took effect forthwith ... and was not subject to review by officers within the chain of command ...

The AMC proceedings

On 8 August 2007 the plaintiff in this matter was charged with the offence of 'an act of indecency without consent' contrary to s 61(3) of the DFDA in its application of s 60(2) of the *Crimes Act 1900* (ACT), and with the offence of assaulting a superior officer, contrary to s 25 of the DFDA. The alleged offences occurred in August 2005, when the plaintiff was a member of the Royal Australian Navy. The charges were referred to the AMC by operation of transitional provisions and on 26 November 2007 the Chief Military Judge nominated the first defendant to try the proceedings.

Following the referral of the charges, the plaintiff commenced these proceedings in the High Court seeking prohibition against the first defendant and a declaration that the provisions of the DFDA establishing the AMC were invalid.

Plaintiff's arguments

In the High Court the plaintiff argued that the AMC was invalid on three grounds:

— the creation of the AMC was inconsistent with s 68 of the Constitution because it was independent from the 'command in chief of the naval and military forces of the Commonwealth' vested by that section in the Governor-General

— the AMC was a federal court impermissibly created outside Chapter III of the Constitution

— the AMC was conferred with a general criminal jurisdiction which was not subordinate and supplementary to the general criminal law.

High Court's decision

The Court did not determine these issues but instead decided the case on the basis that the DFDA purported to confer the judicial power of the Commonwealth on the AMC, which was not a court established in accordance with Chapter III of the Constitution ([60], [98], [113]). The Court declared Part VII Division 3 of the DFDA to be invalid and ordered that the first defendant, the military judge assigned to try the charges against the plaintiff, be prohibited from further proceeding with the charges. Although the Court's decision was unanimous, the judgment of French CJ and Gummow J took a different approach from that of Hayne, Heydon, Crennan, Kiefel and Bell JJ.

The judicial power of the Commonwealth

Central to both judgments is the 'undisputed constitutional principle' that the judicial power of the Commonwealth can only be exercised by a court created

in accordance with Chapter III of the Constitution ([28], [76]). The AMC was clearly not a court created in accordance with Chapter III of the Constitution—at the very least, that is because military judges of the AMC do not have the tenure required by s 72 of the Constitution of justices of 'courts created by the Parliament' ([9], [65]). The central issue, then, was whether the AMC purported to exercise the judicial power of the Commonwealth.

The central issue ... was whether the AMC purported to exercise the judicial power of the Commonwealth.

Courts martial did not exercise judicial power of the Commonwealth

Previous High Court decisions had established that, although courts martial exercised a form of judicial power, it was not 'the judicial power of the Commonwealth' within the meaning of s 71 of the Constitution and was thus not subject to Chapter III of the Constitution ([48], [96], [97]). That had previously been understood to be on the basis that:

> ... [although] a court-martial in performing its functions under the Act is exercising judicial power ... the proper organization of a defence force requires a system of discipline which is administered judicially, not as part of the judicature erected under Ch.III, but as part of the organization of the force itself. Thus the power to make laws with respect to the defence of the Commonwealth [s 51(vi) of the Constitution] contains within it the power to enact a disciplinary code standing outside Ch.III and to impose upon those administering that code the duty to act judicially. [*Re Tracey; Ex parte Ryan* (1989) 166 CLR 518 at 540-541 (Mason CJ, Wilson, Dawson JJ).]

However, in *Lane v Morrison*, Hayne, Heydon, Crennan, Kiefel and Bell JJ emphasised that the relevant constitutional question is whether a court martial exercised the judicial power of the Commonwealth, and to 'speak of a court-martial exercising a species of judicial power is unhelpful if it distracts attention from [that] ... question' ([96]). Further, their Honours explained previous decisions, to the effect that courts martial did not exercise the judicial power of the Commonwealth, on a new basis, namely that the decisions of courts martial were not 'definitive' of guilt, and the punishments they awarded were not final ([86]). That is because:

> The decisions, not only whether to hold a court-martial, but also whether and how effect should be given to a finding by a court-martial of guilt, were matters for confirmation or review by higher authority within the chain of command of the forces. [84]

As a result, 'dispositive' decisions about guilt or punishment were not made by a court martial but within the chain of command. It was, their Honours said, 'right to describe courts-martial as directed to the maintenance of discipline of the forces' and as 'tribunals established to ensure that the discipline administered within the forces was just' which did 'not form part of the judicial system administering the law of the land' ([86]).

AMC exercises the judicial power of the Commonwealth

As noted above, however, the AMC was intended to be independent of the chain of command and for Hayne, Heydon, Crennan, Kiefel and Bell JJ that was 'the chief feature distinguishing it from earlier forms of service tribunal which have been held not to exercise the judicial power of the Commonwealth' ([75]). In that regard:

> ... a central purpose of the creation of the AMC was to have the new body make binding and authoritative decisions of guilt and determinations about punishment which, without further intervention from within the chain of command, would be enforced.

> That … is reason enough to conclude that it is to exercise the judicial power of the Commonwealth. [97]–[98]

Service tribunals must be within the 'historical stream'

The fact that the AMC was independent of the chain of command was also central to the judgment of French CJ and Gummow J in concluding that the AMC was exercising 'the judicial power of the Commonwealth otherwise than in accordance with Ch III of the Constitution' ([10]). However, this was because that feature took the AMC outside the historical conception of the military justice system previously held to have been supported by s 51(vi) ([49]–[51], [60]).

The fact that the AMC was independent of the chain of command was also central to the judgment of French CJ and Gummow J …

In particular, the military justice system in 1900 was 'directed to the maintenance of the defining characteristic of armed forces as disciplined forces organised hierarchically' ([12]), and courts martial operated within that command structure ([10], [12]). By taking the AMC outside the command structure (in order to meet concerns that the previous system denied trial by an independent and impartial tribunal), Parliament exceeded the power conferred by s 51(vi) ([13]).

Creation of AMC as a court

Whilst Hayne, Heydon, Crennan, Kiefel and Bell JJ found it 'unprofitable' to consider whether or in what sense it is right to describe the AMC as a court ([114]), this question was of considerable importance to French CJ and Gummow J, who treated the creation of the AMC as a court as a distinct issue from the jurisdiction that was vested in it ([24]). In particular, their Honours emphasised that the '[t]he powers of the Parliament to create courts are found only in ss 71, 72 and 122 of the Constitution' ([9]), holding that the Australian Constitution does not support the creation of 'legislative courts' resembling those found in the US ([30]). (Legislative courts are bodies recognised in US decisions as able to decide cases and controversies between the US and citizens arising under the laws of the US, yet they are supported by Article I of the Constitution and do not exercise the judicial power of the US provided for in Article III ([27]).)

French CJ and Gummow J then found that in creating the AMC there was 'a legislative intention to create a body with the character of a Chapter III court, save for the manner of appointment and tenure of the Military Judges'. ([20], [32]) This was emphasised by the fact that the AMC was created as a court of record ([32]). However, an appeal lay from the AMC to an administrative body (the Defence Force Discipline Appeals Tribunal) which would not be permissible were the AMC a federal court ([35]). 'The upshot is that while the Parliament has given the AMC some of the attributes of a court which may be created by the Parliament for the exercise of the judicial power of the Commonwealth, it had not created such a body' ([36]).

Other issues

Significance of the AMC being designated a court of record

Justices Hayne, Heydon, Crennan, Kiefel and Bell JJ held that the designation of a body as a court of record may not, without more, establish that it exercises the judicial power of the Commonwealth ([100]). However, their Honours concluded that the effect of the AMC being a court of record was that a person tried by the AMC could not subsequently be tried by a civil court for substantially the same offence ([112]). This would, they said, effect a very different 'adjustment of military and civil law' to that which had previously obtained under both

Imperial and then Australian legislation (when a person could be tried by a court martial and then by a civil court) ([112]), which it was 'desirable to notice' ([98]).

The command in chief vested in the Governor-General by section 68 of the Constitution

Although Hayne, Heydon, Crennan, Kiefel and Bell JJ found it unnecessary to decide the issue ([116]), French CJ and Gummow J gave some consideration to the plaintiff's argument regarding s 68 of the Constitution. That section provides:

> The command in chief of the naval and military forces of the Commonwealth is vested in the Governor-General as the Queen's representative.

French CJ and Gummow J rejected the plaintiff's contention that s 68 vests in the Governor-General personally the prerogative power of the Crown as understood in the United Kingdom to maintain disciplined military forces. Instead they held that the power of command vested by s 68 'is nominal in the sense that it is placed within the system of responsible government' ([58]). As a result, the exercise of that command may be the subject of legislation supported by s 51(vi) of the Constitution ([59]).

French CJ and Gummow J rejected the plaintiff's contention that s 68 vests in the Governor-General personally the prerogative power of the Crown ... to maintain disciplined military forces.

Extent to which Commonwealth can apply (civilian) criminal law to the Defence Force

Previous High Court decisions have considered, but not resolved, the extent to which the Commonwealth can apply State or Territory criminal law to members of the Defence Force pursuant to s 51(vi) of the Constitution. Neither judgment addressed this issue, other than to reject the very narrow view advanced by the plaintiff in this case, which was to the effect that:

> ... the power conferred by s 51(vi) was limited to the punishment of crimes such as those charged here which were committed on active service (not this case) or in the circumstances and places where the jurisdiction of the ordinary courts could not conveniently be exercised. [63], [117]

AGS (Andrew Buckland, Simon Thornton and Kim Pham from the Constitutional Litigation Unit) acted for the Commonwealth, with the Commonwealth Solicitor-General Stephen Gageler SC, Stephen Lloyd SC and James Renwick as counsel.

Text of the decision is available at:
http://www.austlii.edu.au/au/cases/cth/HCA/2009/29.html

Notes

[1] As well as summary authorities, the validity of which was not in issue in these proceedings.

NORTHERN TERRITORY EMERGENCY RESPONSE LEGISLATION VALID

The High Court in a 6:1 decision upheld the validity of Commonwealth laws supporting the Commonwealth's actions to improve the wellbeing of certain communities in the Northern Territory.

A majority of the Court rejected the arguments of the plaintiffs that the statutory grant of a five-year lease of areas of Aboriginal land to the Commonwealth and changes relating to entry entitlements were invalid as they were not supported by s 51(xxxi) of the Constitution (acquisition of property on just terms). The judgments address the interaction between s 51(xxxi) and the territories power in s 122 of the Constitution and affirm that a provision for 'reasonable compensation' satisfies the requirement of 'just terms'.

David Bennett QC
Deputy Government Solicitor
T *02 6253 7063* ***F*** *02 6253 7303*
david.bennett@ags.gov.au

Wurridjal v Commonwealth
High Court of Australia, 2 February 2009
[2009] HCA 2; (2009) 237 CLR 309

Adam Kirk
Senior Lawyer
T *02 6213 6980* ***F*** *02 6213 7110*
adam.kirk@ags.gov.au

Background

Legislation

The *Northern Territory National Emergency Response Act 2007* (Cth) (ER Act) and the *Families, Community Services and Indigenous Affairs and Other Legislation Amendment (Northern Territory National Emergency Response and Other Measures) Act 2007* (Cth) (FCSIA Act) are part of a package of legislation passed by the Parliament in 2007 to support 'an emergency response by the Commonwealth Government to deal with sexual abuse of Aboriginal children in the Northern Territory and associated problems relating to alcohol and drug abuse, pornography and gambling' ([1]).

These proceedings concerned the application of the legislation to land in the township of Maningrida. The Maningrida land is Aboriginal land held by the Arnhem Land Aboriginal Land Trust (Land Trust) for an estate in fee simple under the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) (Land Rights Act) for the benefit of Aboriginals entitled by Aboriginal tradition to use or occupy the land. The plaintiffs were two individual Maningrida traditional owners and the Bawinanga Aboriginal Corporation. By s 70 of the Land Rights Act it is an offence for a person to enter or remain on Aboriginal land unless they come within one of the exceptions, which include having a permit issued under the *Aboriginal Land Act* (NT) by the relevant Land Council and actions authorised by s 71 (which creates a statutory entitlement for any Aboriginal or group of Aboriginals to enter upon and use or occupy Aboriginal land in accordance with Aboriginal tradition).

The Commonwealth five-year lease

In order to facilitate action to address issues such as living conditions in the main townships, Part 4 of the ER Act granted to the Commonwealth five-year leases of certain Aboriginal lands, including the Maningrida land. A lease gives the Commonwealth exclusive possession and quiet enjoyment (s 35), but the Act preserves any interests in the land which were in existence prior to the grant of the lease (s 34). Section 60 of the ER Act provides that, if the operation of Part 4 would result in an acquisition of property to which s 51(xxxi) of the Constitution applies from a person otherwise than on just terms, the Commonwealth is liable to pay a reasonable amount of compensation to the person.

Access under traditional entitlements and changes to the 'permit system'

Also, to improve access to the main townships, the FCSIA Act amended the Land Rights Act, including s 70, to provide that persons could enter or remain on limited parts of Aboriginal land in the townships, including access roads and common areas. The amendments are expressed not to limit the application of s 71. The FCSIA Act (item 18 in Schedule 4) also provides for a reasonable amount compensation to be paid by the Commonwealth in the event that action taken under the amendments would result in an acquisition of property to which s 51(xxxi) of the Constitution applies from a person otherwise than on just terms.

Constitutional issues

The plaintiffs sought declarations in the High Court that various provisions of the ER Act and the FCSIA Act were invalid in their application to the Maningrida land as they resulted in an acquisition of property to which s 51(xxxi) of the Constitution applied and did not provide just terms for the acquisition. The Commonwealth demurred to the whole of the statement of claim and the demurrer was referred to the Full Court for hearing. The following constitutional issues were raised involving different grounds on which the demurrer might be upheld:

- Does s 51(xxxi) constrain Parliament's power to make laws under s 122 for the government of the Northern Territory (the territories issue)?
- Does the challenged legislation effect an 'acquisition of property' within s 51(xxxi) (the acquisition issue)?
- Does the challenged legislation provide 'just terms' for any acquisition (the just terms issue)?

High Court's decision

By a 6:1 majority the High Court allowed the Commonwealth's demurrer, finding that the challenged legislation was valid. Of the majority, Gummow and Hayne JJ gave a joint judgment and the other justices each gave a separate judgment. Within the majority, several different approaches were taken to the need to resolve, or to the resolution of, each of the constitutional issues. Kirby J (dissenting), who would have overruled the demurrer, considered that the plaintiffs' claims for relief were 'far from unarguable' and that it was inappropriate that the Commonwealth should be given peremptory legal relief without evidence being heard. Rather, the plaintiffs' entitlement to final relief should be determined at a trial ([204], [212]).

Territories issue

The Commonwealth argued that the Court should apply its decision in *Teori Tau v Commonwealth* (1969) 119 CLR 564 (*Teori Tau*) that s 51(xxxi) of the Constitution does not qualify the territories power in s 122. It was sufficient for validity that the challenged legislation was supported by s 122 even if the laws might also be supported under s 51(xxvi) (the races power). The Commonwealth also argued, if it be necessary, that s 51(xxxi) did not apply because the subject-matter of the legislation is directed solely to matters and things within a territory.

Three justices in the majority (French CJ at [46]–[86] and Gummow and Hayne JJ at [175]–[189]), as well as Kirby J in his dissenting judgment ([287]), concluded that *Teori Tau* should be overruled. On their approach, a law which is properly characterised as being a law 'with respect to the acquisition of property' must provide just terms as required by s 51(xxxi) even if the law might also be characterised as otherwise being within the territories power. The

A law which is properly characterised as being a law 'with respect to the acquisition of property' must provide just terms ... even if the law might also be characterised as otherwise being within the territories power.

conclusion that *Teori Tau* should be overruled was based upon an 'integrationist' approach to construction of the constitutional text which did not accept that s 122 is to be treated as 'disjoined' from the rest of the Constitution ([47]–[48] and [175], [178] and [188], referring to Dixon CJ in *Lamshed v Lake* (1958) 99 CLR 132).

French CJ concluded that the brief reasoning in Teori Tau *did not adequately address 'powerful' constructional considerations affecting the interaction between ss 122 and 51(xxxi).*

French CJ referred to the 'strongly conservative cautionary principle, adopted in the interests of continuity and consistency' that the Court should not lightly overrule an earlier decision ([70]). However, he concluded that the brief reasoning in *Teori Tau* did not adequately address 'powerful' constructional considerations affecting the interaction between ss 122 and 51(xxxi). These included the general principle explained by Dixon CJ in *Attorney-General (Cth) v Schmidt* (1961) 105 CLR 361, 371–372 (*Schmidt*) that the conferral of an express power subject to a safeguard or restriction (such as in s 51(xxxi)) is inconsistent with construing another power as authorising laws without that safeguard or restriction ([75]); and the principle pre-dating federation, which should inform the construction of the Constitution, that absent clear language a statute should not be construed as authorising an acquisition of property without compensation ([76]–[77]). Also, *Teori Tau* did not accord with a pre-existing stream of authority, nor was there a subsequent stream of authority applying the decision or evidence it has been acted upon in a significant way ([85]).

Gummow and Hayne JJ also applied the reasoning of Dixon CJ in *Schmidt* to the interaction of ss 51(xxxi) and 122 ([185]) and referred to the accepted position that a law may bear more than one character in its relation to heads of power. There was no incongruity in reading s 122 as limited in relevant respects by s 51(xxxi):

> In considering the validity of a law passed by the Parliament, it is neither necessary nor appropriate to seek to characterise that law as a law with respect to a single head of legislative power. The law may, and commonly will, find support in several heads of power. The present case, and the situation considered in *Newcrest* [(1997) 190 CLR 513], are examples where s 122 is one of several heads. ... Secondly, if, in addition to whatever other characters it may have, the law has the character of a law with respect to the acquisition of property, the law in that aspect must satisfy the safeguard, restriction or qualification provided by s 51(xxxi), namely, the provision of just terms. [187]

The other three justices in the majority did not decide whether *Teori Tau* should be overruled. Although there was no majority on this issue within the majority judgments, Heydon J did observe that 'in consequence of the approach of the plurality judgment in this case, there will in future be no doubt as to the relationship between s 51(xxxi) and s 122 of the Constitution' ([325]). Kiefel J applied the approach adopted (as an alternative) by a majority in *Newcrest Mining (WA) Ltd v BHP Minerals Ltd & Commonwealth* (1997) 190 CLR 513 that s 51(xxxi) would apply at least to a law which is supported by a head of power in s 51 as well as by s 122. Here, the challenged legislation was made under s 51(xxvi) as well as s 122. *Teori Tau* was premised 'upon s 122 being the only [legislative] power in question and for that reason is not determinative of an outcome in this case' ([460]). See also Crennan J at [355].

Acquisition issue

The Commonwealth argued that, even if s 51(xxxi) is capable of applying to laws enacted under s 122, the matters pleaded by the plaintiffs did not show that the challenged legislation effected an acquisition of property. The demurrer should therefore be upheld because the two types of 'property' said by the plaintiffs to have been affected by the challenged legislation (the fee simple estate vested in the Land Trust and the entitlements conferred by s 71 of

the Land Rights Act on the individual plaintiffs) had not been 'acquired' within the meaning of s 51(xxxi).

The five-year lease

A majority of the Court decided that the statutory grant of the five-year lease to the Commonwealth did effect an 'acquisition of property' within s 51(xxxi) from the Land Trust. At the hearing, the Commonwealth accepted that the fee simple estate held by the Land Trust was 'property' but submitted that the challenged legislation did not involve an 'acquisition of property' as the 'legislative scheme of the Land Rights Act [under which the fee simple estate was granted] had always been subject to adjustment of the interests necessarily involved' ([97], see also [166]).

A majority of the Court decided that the statutory grant of the five-year lease to the Commonwealth did effect an 'acquisition of property' within s 51(xxxi) from the Land Trust.

French CJ accepted that the Land Rights Act showed that the fee simple estate held by the Land Trust was 'subject to close regulation' and that legislative amendments 'affecting the powers of Land Trusts and Land Councils in dealing with the fee simple estates granted under the Act, are unlikely to constitute acquisitions of property within the meaning of s 51(xxxi)' ([102]). However, although in a broad sense the five-year lease was a legal device adopted for regulatory purposes in providing services to the communities, its legal effect was:

> ... to diminish the ownership rights conferred by the grant of the fee simple estate so far as they related to the Maningrida township. By operation of s 35 of the [ER Act] the statutory lease conferred upon the Commonwealth the essential rights of a lessee abstracted from the fee simple estate. It also conferred the right to vary the area covered by the lease and to terminate the lease early. An acquisition of property is no less an acquisition of property because it also has a regulatory or other public purpose. [103]

Gummow and Hayne JJ ([166]–[173]) and Kiefel J ([452]) also found that the grant of the five-year lease effected an acquisition of property. Gummow and Hayne JJ accepted the submissions of the Land Trust that the statutory regime of the Land Rights Act, although circumscribing the use of the Maningrida land by the Land Trust through the involvement of the Commonwealth Minister and the Land Council, was not such that the fee simple estate was 'so unstable or defeasible by the prospect of subsequent legislation' as to deny any operation of s 51(xxxi) of the Constitution ([171]). Heydon J did not decide the acquisition issue, determining the demurrer only on the just terms issue ([318]).

Of the majority Justices, Crennan J took a markedly different approach to the effect of the grant of the five-year lease. Her Honour agreed with Gummow and Hayne JJ that 'the Commonwealth's broad submission that the fee simple is unstable and defeasible and therefore inherently vulnerable to *any* statutory change in the control of the land must be rejected' but accepted the narrower submission 'that the scheme of control of Aboriginal land in the Land Rights Act was always susceptible to an adjustment of the kind effected by the challenged provisions, in circumstances such as the existence of the present problems' ([441]). The five-year lease to the Commonwealth did not effect an acquisition of property for the purposes of s 51(xxxi) because it fell within what is inherent in the Land Rights Act, 'that there can be a limited legislative adjustment of the control of the land if a need for such an adjustment arises and if that limited adjustment is directed to achieving the purposes of the Land Rights Act, namely supporting the traditional Aboriginal owners' ([443]). In contrast, a lease granted to the Commonwealth for defence purposes might well fall within s 51(xxxi) ([413]).

Kirby J agreed with the reasons of Gummow and Hayne JJ on the acquisition effected by the five-year lease ([289]).

Section 71 traditional rights

The two individual plaintiffs argued that the challenged legislation acquired their rights of entry and use under s 71 of the Land Rights Act, as the rights were made terminable at will by the Minister or effectively suspended by the grant of the lease. However, a majority of the Court did not accept that, properly construed, the provisions had these effects. Gummow and Hayne JJ held that the s 71 statutory entitlements of the plaintiffs, being in existence prior to the grant of the lease, were preserved by s 34 of the ER Act to which the Commonwealth's exclusive possession and quiet enjoyment under s 35 was expressly made subject ([155]–[157]). They also held that the Commonwealth's power under s 37 of the ER Act to terminate interests that were preserved under s 34 was not aptly worded, including with its provision for written notice, to authorise termination of the statutory entitlements of a group of Aboriginals under s 71 ([159]). It followed that there had been no acquisition of s 71 entitlements and the constitutional issues concerning 'acquisition of property' did not need to be addressed.

French CJ accepted that the s 71 entitlements constituted property for the purposes of s 51(xxxi), but agreed with Gummow and Hayne JJ that those rights were preserved by s 34 of the ER Act and that s 37 of the ER Act could not be used to terminate them, so that there had been no acquisition ([109]–[115]). Crennan J agreed with Gummow and Hayne JJ and made some additional comments ([408]–[411]). Kiefel J also found that there was no acquisition of the s 71 entitlements ([455]). Kirby J, in dissent, concluded that the plaintiffs had an 'arguable claim' of acquisition with respect to the asserted changes to their s 71 entitlements which could not be resolved only on the pleadings ([291]–[302]).

The changes to the 'permit system'

The plaintiffs argued that the changes to the 'permit system' deprived the Land Trust of its entitlement to exclusive possession and enjoyment of the common areas within the Maningrida land. However, the Court did not treat these changes as having any relevant consequence additional to the grant of the five-year lease. French CJ held that the changes to the permit system constituted an acquisition of property but accepted the Commonwealth's submission that the changes had no effect additional to the statutory lease itself, which had already ousted the right of the Land Trust to exclude others from the land ([105]–[108]; also Crennan J at [439]).

Just terms issue

As a majority held that the grant of the five-year lease under Part 4 of the ER Act did effect an acquisition of the Land Trust's property within the meaning of s 51(xxxi) of the Constitution, it was necessary to consider the final issue which was whether the challenged legislation was invalid for a failure to provide 'just terms' for that acquisition. A majority of the Court decided that the requirement for just terms was satisfied by the provision in s 60 of the ER Act that the Commonwealth pay a 'reasonable amount of compensation', to be determined by a court in the absence of agreement. Gummow and Hayne JJ rejected the submission that s 60 was inadequate as creating 'contingent' rights:

> The section is in the well recognised and preferable form whereby if the necessary constitutional fact exists (the operation of s 51(xxxi)) a liability is imposed by s 60(2) and jurisdiction is conferred by s 60(3). Section 60 is an example of prudent anticipation by the Parliament that its law may be held to attract the operation of s 51(xxxi) and of the inclusion of provision for compensation in that event, thereby avoiding the pitfall of invalidity.

A majority of the Court decided that the requirement for just terms was satisfied by the provision in s 60 of the ER Act that the Commonwealth pay a 'reasonable amount of compensation' ...

> Moreover, the right to compensation is absolute if it transpires that s 51(xxxi) is engaged. [196]

Their Honours said that the phrase 'reasonable compensation' was apt to include provision for interest in the case of delay in payment ([197]) and rejected the suggestion that the acquisition of the Land Trust's fee simple might fall within a category of 'incompensable interests' ([198]). However, they left to another day whether there might be other cases where 'something less than a complete acquisition might be mandated by the Constitution so as to minimise the prejudice suffered by the holders of rights not readily compensable in money terms' ([198]).

[Gummow and Hayne JJ] rejected the suggestion that the acquisition of the Land Trust's fee simple might fall within a category of 'incompensable interests'.

Heydon J, without deciding the other constitutional issues, upheld the demurrer on the basis that s 60 provided just terms for any acquisition of property. In coming to this conclusion, his Honour rejected a number of submissions made by the plaintiffs, including that, because the right to compensation might need to be vindicated in lengthy court proceedings, s 60 only provided for 'contingent' compensation which did not amount to just terms ([323]–[329]; see also Kiefel J at [465]–[466]). The consequences of any delay could be overcome by orders for interest ([326], [330]–[331]).

Heydon J also rejected the plaintiffs' argument that the assessment of 'reasonable compensation' could not occur where there was no commercial market for parts of the property acquired (in particular, sacred sites) or to take account of non-financial disadvantages suffered by traditional Aboriginal owners ([336]–[337]). Heydon J referred to the High Court's recent decision in *Griffiths v Minister for Lands, Planning and Environment* (2008) 235 CLR 232 in which a majority of the Court assumed that it was possible to extinguish native title on just terms.

However, his Honour concluded, for a number of reasons, that this was not an appropriate occasion to consider the plaintiffs' argument that the *sui generis* nature of traditional Aboriginal rights meant that 'just terms' for their acquisition could require something more than the provision of monetary compensation (or preclude unnecessary interference), such as the maintenance of concurrent rights to be exercised for traditional purposes or continuing rights and responsibilities over sacred sites ([338]–[339]). Any possible special position of sacred sites did not need to be addressed, as no interference with rights relating to sacred sites was identified ([339]); see also Gummow and Hayne JJ at [163]–[165] and Kiefel J at [468]).

French CJ agreed, for the reasons given by Heydon J, that the compensation provisions of the ER Act 'afforded just terms for the acquisition of the Land Trust property' ([104]), as did the compensation provisions of the FCSIA Act ([108]). Crennan J did not need to decide the just terms issue as she held that there had been no acquisition of property. Kiefel J said that 'the provision of compensation, expressed as an amount that is fair and reasonable in all the circumstances, prima facie complies with the requirement of s 51(xxxi)' ([463]).

Her Honour also cast doubt on the argument that the 'special value' which particular areas may have for traditional owners, such as sacred sites, may not be compensable by money but did not need to decide the issue ([467]–[468]).

Kirby J, in dissent, found that the Commonwealth had failed to demonstrate that the plaintiffs' arguments on the just terms issue were not 'reasonably arguable' ([303]–[309]). His Honour suggested that just terms arguably 'imports a wider notion than the provision of monetary compensation' ([207]) and in the context of traditional Aboriginal interests 'could well require consultation before action; special care in the execution of the laws; and active participation

in performance in order to satisfy the constitutional obligation in these special factual circumstances' ([309]).

AGS (Adam Kirk and David Bennett QC from the Constitutional Litigation Unit) acted for the Commonwealth with then AGS Chief General Counsel Henry Burmester AO QC, Stephen Lloyd SC and Anna Mitchelmore as counsel.

Text of the decision is available at:
http://www.austlii.edu.au/au/cases/cth/high_ct/2009/2.html

SUPERANNUATION SURCHARGE ON SOUTH AUSTRALIAN PARLIAMENTARIANS INVALID

In a unanimous decision, six justices of the High Court held invalid the Commonwealth superannuation surcharge in its application to a former South Australian parliamentarian. The federal legislation was held to infringe the *Melbourne Corporation* doctrine that prevents the Commonwealth from interfering with the capacity of a State to function as a government.

David Lewis
Senior Executive Lawyer
T *02 6253 7541* ***F*** *02 6253 7303*
david.lewis@ags.gov.au

Clarke v Commissioner of Taxation
High Court of Australia, 2 September 2009
[2009] HCA 33; (2009) 83 ALJR 1044; (2009) 258 ALR 623

Background

Mr Clark was a member of the South Australian House of Assembly between 1993 and 2002. He challenged the validity of two Commonwealth Acts (the CPF Surcharge Acts):

— the *Superannuation Contributions Tax (Members of Constitutionally Protected Superannuation Funds) Assessment and Collection Act 1997*

— the *Superannuation Contributions Tax (Members of Constitutionally Protected Superannuation Funds) Imposition Act 1997*.

These laws were held invalid in *Austin v Commonwealth* (2003) 215 CLR 185 (*Austin*) in their application to a judge of the Supreme Court of New South Wales on the ground that they significantly impaired the exercise by the State of its freedom to select the manner and method for discharge of its constitutional functions respecting remuneration of its judges. *Austin* was an application of the principle in *Melbourne Corporation v Commonwealth* (1947) 74 CLR 31 (*Melbourne Corporation*).

Mr Clarke was a member of three relevant superannuation schemes:

— the Parliamentary Superannuation Scheme (PSS) continued under the *Parliamentary Superannuation Act 1974* (SA)

— the State Superannuation Benefit Scheme (SBS) under the *Superannuation (Benefit Scheme) Act 1992* (SA), until 30 June 1998

— the Southern State Superannuation Scheme (SSS) under the *Southern State Superannuation Act 1994* (SA), from 1 July 1998.

Broadly, the superannuation surcharge was a tax upon contributions actually or notionally paid for the provision of superannuation or other retirement benefits for certain 'high income earners'. Generally speaking, the PSS was a defined benefits superannuation scheme for the purposes of the CPF Surcharge Acts. A defined benefits superannuation scheme is one that has at least one member

in respect of whom the benefits are calculated by reference to factors such as the member's salary at a particular date. The SBS and SSS were not defined benefits superannuation schemes for the purposes of the CPF Surcharge Acts.

Each of the funds was a 'constitutionally protected superannuation fund' for the CPF Surcharge Acts. In general terms, constitutionally protected superannuation funds are superannuation funds (specified in regulations) where the actual fund of money is held by a State.

Under the superannuation surcharge legislation of general application (rather than the CPF Surcharge Acts), the surcharge was generally payable by the relevant superannuation provider (*Superannuation Contributions Tax (Assessment and Collection) Act 1997*; *Superannuation Contributions Tax Imposition Act 1997*). However, under the CPF Surcharge Acts, the surcharge was instead payable by the relevant fund member. This was to avoid any argument that the surcharge could not be imposed on constitutionally protected superannuation funds on the basis that such funds are the property of a State and therefore cannot be taxed by the Commonwealth because of s 114 of the Constitution ([51]).

Decision

Summary

The Court held that the capacity of the States to fix parliamentarians' remuneration (and thereby attract competent candidates) is a 'critical aspect' of the capacity of a State to conduct the parliamentary form of government which is assumed by the Constitution. The federal laws which applied the superannuation surcharge to 'constitutionally protected superannuation funds' restricted State legislative choice in fixing that remuneration. Those laws were not laws of general application but, rather, singled out the States for differential treatment. Interfering with the fixing of the remuneration of Mr Clarke, even in the way done in respect of the two lesser superannuation schemes considered in this case, which did not involve a significant financial burden on Mr Clarke, infringed the *Melbourne Corporation* implied limitation.

The Court held that the capacity of the States to fix parliamentarians' remuneration ... is a 'critical aspect' of the capacity of a State to conduct the parliamentary form of government which is assumed by the Constitution.

Judgments

French CJ delivered a judgment and also agreed with certain of Hayne J's reasons concerning the SBS and SSS ([36]). Gummow, Heydon, Kiefel and Bell JJ delivered a joint judgment, and also agreed with Hayne J ([59]). Hayne J agreed with the joint judgment and gave additional reasons, particularly concerning the SBS and SSS ([90]). Crennan J did not sit.

Gummow, Heydon, Kiefel and Bell JJ

In discussing the *Melbourne Corporation* limitation as elucidated in *Austin*, the joint judgment referred in particular to six points, which are addressed in turn below (the discussion also covers references to the same matters in the other judgments).

1. *Not laws of general application:* The CPF Surcharge Acts are not laws of general application which the States must take as they find them as part of the system governing the whole community ([61]). The Acts single out States, or members of constitutionally protected superannuation funds, and impose the surcharge on the member rather than on the superannuation provider (which is the case in respect of the general surcharge laws) ([35], [61], [97]).
2. *Critical for State to be able to fix remuneration of higher office holders:* parliamentarians are persons 'at the higher levels of government' and the capacity of the States to fix the amount and terms of remuneration of such persons is a 'critical aspect' of the conduct of the parliamentary form of

government by the State, which is assumed by the Constitution ([62]; [36], [69], [74], [92]). The State has an interest in attracting, by the making of suitable remuneration, competent persons to serve as legislators ([69], [74]). It was too narrow to ask whether liability to pay the surcharge created a 'substantial disincentive' to stand for election ([73]).

In *Re Australian Education Union v Victoria* (1995) 184 CLR 188 (*Re Australian Education Union*), six members of the High Court said that the *Melbourne Corporation* doctrine prevented the Commonwealth from empowering the Industrial Relations Commission to make an award binding on the States in relation to the terms and conditions of employment or engagement of State officers 'at the higher levels of government'. In terms referred to in *Austin*, and by reference to *Austin* in the present case ([62], [92], [97]), the six members of the Court in *Re Australian Education Union* said:

> Ministers, ministerial assistants and advisers, heads of departments and high level statutory office holders, parliamentary officers and judges would clearly fall within this group.

3. *Size of financial burden:* the joint judgment referred to remarks of Gleeson CJ in *Austin* that the focus is on the disabling effect on a State's authority rather than the size of the financial burden:

   > ... it is the impairment of constitutional status, and interference with capacity to function as a government, rather than the imposition of a financial burden, that is at the heart of the matter, although there may be cases where the imposition of a financial burden has a broader significance. [63]; [33]

4. *Inconsistency test not applicable:* while the governmental capacities of the States will often be manifested in legislation, the application of the *Melbourne Corporation* doctrine is not to be determined 'by the methods of comparison between federal and State laws enacted under concurrent powers but said to attract the operation of s 109 of the Constitution' ([64]).

5. *Discrimination not determinative:* discrimination against or the singling out of the States by the federal law, while significant, is not determinative ([27], [34], [65]). As the joint judgment put it, discrimination by a federal law against a State 'is but an illustration of a law which impairs the capacity of the State to function in accordance with the constitutional conception of the Commonwealth and States as constituent entities of the federal structure' ([65]).

   However, French CJ and Hayne J both emphasised the fact that the CPF Surcharge Acts were not laws of general application but, rather, singled out the States or persons at the higher levels of State government ([34], [35], [96], [97]).

6. *One limitation—special burden, curtailment of capacity of States to function as governments:* in previous cases on the *Melbourne Corporation* implied limitation, some justices referred to two limbs of the limitation. One limb was said to prohibit discrimination which involves the placing on the States of special burdens or disabilities and another to prohibit laws of general application which operate to destroy or curtail the continued existence of the States or their capacity to function as governments: see e.g. *Queensland Electricity Commission v Commonwealth* (1985) 159 CLR 192 at 217 per Mason J.

   However, in this case, the joint judgment (and indeed all of the justices) accepted the statement in the joint judgment in *Austin* that there is only

Discrimination against or the singling out of the States by the federal law, while significant, is not determinative.

one limitation ([16], [28], [32], [66], [93]). The joint judgment repeated the statement in the joint judgment in *Austin* that the limitation:

> ... requires assessment of the impact of particular laws by such criteria as 'special burden' and 'curtailment' of 'capacity' of the States 'to function as governments'. These criteria are to be applied by consideration not only of the form but also 'the substance and actual operation' of the federal law. Further, this inquiry inevitably turns upon matters of evaluation and degree and of 'constitutional facts' which are not readily established by objective methods in curial proceedings. [66]

Conclusion on PSS—fixing remuneration critical; impairment of State choice: in concluding on the PSS, the joint judgment again emphasised that it is critical to a State's conduct of the parliamentary form of government that it be able to fix the remuneration of its parliamentarians (i.e. the second factor discussed above) ([69], [74]) and referred to the restriction of State legislative choice ([72], [75]).

The CPF Surcharge Acts impaired or curtailed the State's legislative choice with respect to fixing parliamentary remuneration ...

The CPF Surcharge Acts impaired or curtailed the State's legislative choice with respect to fixing parliamentary remuneration; the State was 'left with no real choice but to provide retirement benefits by a method which enabled parliamentarians to meet the burden imposed by the surcharge legislation' ([72]; [36], [75], [101]).

A general provision in the State law dealing with the PSS (in force before the enactment of the CPF Surcharge Acts) which enabled a parliamentarian to elect to commute a part of their pension (and so might allow payment of the surcharge) only allowed commutation at what was likely to be less than the present value of the pension foregone, and the election had to be made within three months of becoming entitled to benefits ([12], [45], [70]). Amendments to the State legislation to allow commutation of part of a pension specifically to pay a surcharge debt were considered to reasonably evidence the significance of the effects of the surcharge on State legislators and were thereby indicative of the curtailment or restriction of the State's legislative choice ([13], [14], [35], [72]).

Each of the justices also referred to the fact that, for Mr Clarke (as for all defined benefits members), calculation of the surcharge for the PSS depended on notional contributions and actuarial calculations, necessarily based on assumptions which may not be accurate in relation to Mr Clarke ([10], [68], [98]–[99]; cf. [100]). The result is that benefits actually received may be less than those assumed in the actuarial calculations ([68]).

Other funds—SBS and SSS: The primary reasoning of the joint judgment is expressed with respect to the PSS, being the defined benefit fund to which Mr Clarke belonged, in relation to which Mr Clarke had much larger benefits ([91]). However, essentially the same reasoning applied in respect of the other two schemes, the SBS and SSS ([36], [88], [104]). Matters of evaluation and degree were necessarily involved in reaching that conclusion ([88]).

Hayne J held that neither the fact that the SBS and SSS were not defined benefits funds nor the fact that contributions to those funds may have been made in compliance with the State's obligations under the Commonwealth superannuation guarantee legislation affected the assessment of the impact of the relevant provisions upon the capacity of the State to function as a government ([104]).

French CJ's multifactorial assessment

While French CJ's reasoning and conclusions had much in common with the other justices in this case, he expressly identified a 'multifactorial assessment' of the application of the implied limitation. He said that factors relevant to its application include:

1. Whether the law in question singles out one or more of the States and imposes a special burden or disability on them which is not imposed on persons generally.
2. Whether the operation of a law of general application imposes a particular burden or disability on the States.
3. The effect of the law upon the capacity of the States to exercise their constitutional powers.
4. The effect of the law upon the exercise of their functions by the States.
5. The nature of the capacity or functions affected.
6. The subject matter of the law affecting the State or States and in particular the extent to which the constitutional head of power under which the law is made authorises its discriminatory application. [34]

Validity of other Commonwealth taxes

French CJ expressly indicated that Commonwealth taxes of general application, such as income tax and fringe benefits tax, are valid in their application to members of Parliament, State Ministers, and judges ([19]). Similarly, the joint judgment noted that payroll tax and fringe benefits tax had been mentioned by Gleeson CJ in *Austin* as instances of federal laws of 'general application' that validly had been imposed on the States, along with taxpayers generally ([61]).

AGS (David Lewis and David Bennett QC from the Constitution Litigation Unit) acted for the Commonwealth Attorney-General with the Solicitor-General, Stephen Gageler SC, Dr Melissa Perry QC and Ms Marita Wall as counsel. AGS Adelaide (Dusan Uglesic) acted for the Commissioner of Taxation with Dr Perry and Ms Wall as counsel.

Text of the decision is available at:
http://www.austlii.edu.au/au/cases/cth/HCA/2009/33.html

MEDICARE AND PSR SCHEMES VALID

The High Court by a 6:1 decision rejected a challenge to the constitutional validity of both the Medicare Scheme and the Professional Services Review (PSR) Scheme established by the *Health Insurance Act 1973*, finding that the schemes do not authorise the civil conscription of medical practitioners contrary to s 51(xxiiiA) of the Constitution.

Wong v Commonwealth of Australia; Selim v Lele
High Court of Australia, 2 February 2009
[2009] HCA 3; (2009) 236 CLR 573

Andrew Buckland
Senior Executive Lawyer
T *02 6253 7024* ***F*** *02 6253 7303*
andrew.buckland@ags.gov.au

Legislative provisions establishing Medicare and PSR schemes

Part II of the Health Insurance Act provides for the payment of a Medicare benefit to a patient who incurs expenses for certain medical services, and allows for what is known as bulk billing (a patient and practitioner may agree to the patient assigning to the practitioner the patient's entitlement to Medicare benefit in full payment of the medical expenses incurred).

Part VAA of the Act establishes the PSR Scheme, which is designed to address abuse of the Medicare Scheme. It is an administrative mechanism for the investigation and peer review of the conduct of a medical practitioner to determine whether the practitioner has engaged in 'inappropriate practice' in

connection with rendering services for which a Medicare benefit is payable and, if so, whether the practitioner should be disciplined.

The concept of 'inappropriate practice' requires that the standard of service to be met for a Medicare benefit to be paid is the standard acceptable to the general body of practitioners. A practitioner suspected of having engaged in inappropriate practice can be referred to a 'Professional Services Review Committee' comprised of three relevantly qualified medical practitioners (ss 93, 95).

If a PSR Committee finds that a practitioner has engaged in inappropriate conduct, sanctions can be imposed, including disqualification from the Medicare Scheme and the repayment of Medicare benefits received by the medical practitioner.

Background

The appellants were each found to have engaged in inappropriate practice by a PSR Committee. They each brought proceedings challenging the validity of the Medicare and PSR schemes as imposing civil conscription contrary to s 51(xxiiiA) and as impermissibly conferring judicial power on PSR Committees. The Full Federal Court unanimously dismissed the challenge, and the appellants were granted special leave to appeal the civil conscription point to the High Court (the judicial power challenge having been abandoned).

Constitutional issues

Section 51(xxiiiA) of the Constitution relevantly confers power on the Parliament to make laws with respect to:

> ... pharmaceutical, sickness and hospital benefits, medical and dental services (but not so as to authorize any form of civil conscription), ...

The appellants argued that:

— A general practitioner is practically compelled to participate in the Medicare Scheme and this amounts to civil conscription.

— The PSR Scheme, by effectively requiring a practitioner not to engage in 'inappropriate practice', impermissibly interferes in the professional delivery of medical services and also amounts to civil conscription.

These arguments were rejected by a majority of the Court (Heydon J dissented).

Meaning of civil conscription

The key issue in the case was the meaning of the phrase 'civil conscription' in s 51(xxiiiA) of the Constitution.

The joint judgments of French CJ and Gummow J, and of Hayne, Crennan and Kiefel JJ both accepted the Commonwealth's submission that civil conscription involves compulsion or coercion to carry out work or provide services ([60], [192], [208]). The compulsion may be legal or practical ([60], [208]). It may be to perform a particular medical service, or to perform medical services at a particular place or for particular persons. It would include, but need not involve, performing services as an employee of the Commonwealth ([54], [208]).

Although practitioners are practically compelled to participate in the Medicare Scheme ([207]), under that scheme they are not compelled to practise medicine or to perform any particular medical service and thus the compulsion does not amount to civil conscription ([67]–[68], [209]). Rather, the Medicare Scheme assumes and operates on the (voluntary) provision of medical services.

Under [the Medicare Scheme, practitioners] are not compelled to practise medicine or to perform any particular medical service and thus the compulsion does not amount to civil conscription.

Furthermore the PSR Scheme, by requiring that the professional activities of medical practitioners conform to professional norms of conduct, does not thereby authorise any form of civil conscription ([65], [226]).

In contrast, Kirby J (in the majority) and Heydon J (in dissent) saw the prohibition on civil conscription as protecting the relationship between a medical practitioner and their patient ([125]–[128], [268]–[277]), but differed in the result:

— Kirby J upheld the legislation on the basis that, although detailed obligations of professional behaviour were imposed on the provider of medical services, it neither compelled the provision of a service nor disproportionately regulated the individual consensual relationship between the provider and their patient ([151], [155]).

— Heydon J would find the Act invalid because the degree of governmental control it established over 'a practitioner's medical and professional activities would have been inconsistent with the nature of the doctor–patient relationship as understood in 1946' ([268]), including as to 'the time to be spent with the patient, the kind of tests to be performed, the drugs to be prescribed and the medical records to be kept' ([267]).

Use of historical and other material in construing section 51(xxiiiA)

Section 51(xxiiiA) was introduced into the Constitution as a result of a referendum held in 1946. In interpreting the meaning of 'civil conscription' in the section, both joint judgments had regard to 'matters of history and usage', including:

In interpreting the meaning of 'civil conscription' in the section, both joint judgments had regard to 'matters of history and usage' ...

— the parliamentary debates leading up to the referendum, and the terms of the YES and NO cases for the proposed law ([43]–[51], [176]–[186])

— the understanding of the related phrase 'industrial conscription' in the period leading up to the referendum, particularly as used in Commonwealth and State legislation ([31]–[42], [51], [187]–[192]).

In contrast, Kirby J repeatedly distanced himself from what he termed this 'originalist' approach to constitutional interpretation ([73]–[76], [90]–[105]), stating:

> ... such historical materials do not control the meaning of the constitutional language. Identifying that meaning is a task of legal analysis, not of historical research. [75]

AGS (Adam Kirk and Andrew Buckland from the Constitutional Litigation Unit) acted for the Commonwealth in *Wong* and for the Commonwealth Attorney-General who intervened in *Selim*, with the Solicitor-General Stephen Gageler SC, Rhonda Henderson and Kate Richardson as counsel.

Text of the decision is available at:
http://www.austlii.edu.au/au/cases/cth/HCA/2009/3.html

CONSTITUTIONAL DECISIONS IN BRIEF

Occupational health and safety prosecutions

John Holland Pty Ltd v Victorian Workcover Authority
John Holland Pty Ltd v Inspector Nathan Hamilton
High Court of Australia, 13 October 2009
[2009] HCA 45 and [2009] HCA 46

In two unanimous decisions the High Court has decided that an employer could continue to be prosecuted for alleged breaches of State occupational health and safety (OH&S) laws that occurred before the employer became subject to the Commonwealth OH&S law. There was no inconsistency for the purposes of s 109 of the Constitution that would invalidate this operation of the State laws.

Gavin Loughton
Senior Executive Lawyer
T *02 6253 7203* ***F*** *02 6253 7583*
gavin.loughton@ags.gov.au

Simon Thornton
Lawyer
T *02 6253 7287* ***F*** *02 6253 7303*
simon.thornton@ags.gov.au

Background

In the Victorian case (*John Holland Pty Ltd v Victorian Workcover Authority*), the Victorian Workcover Authority (VWA) had begun a prosecution of John Holland Pty Ltd (a construction company) for alleged offences under Victorian OH&S legislation. The alleged offences concerned a workplace accident that happened in 2006.

The VWA's attempted prosecution did not begin until 2008. By that time John Holland Pty Ltd had (from 14 March 2007) become an 'employer' for the purposes of—i.e. had come to be covered by—the *Occupation Health and Safety Act 1991* (Cth) (the Cth OHS Act). That Act contains a provision—s 4—which says:

> (1) Subject to subsection (2) [not presently relevant], this Act is intended to apply to the exclusion of any law of a State or Territory (other than a law prescribed under subsection (3)) to the extent that the law of the State or Territory relates to occupational health and safety and would otherwise apply in relation to employers, employees or the employment of employees.

John Holland Pty Ltd argued that s 4 had the effect of preventing John Holland Pty Ltd, once it had come under the Cth OHS Act, from being prosecuted for alleged earlier offences that occurred while it was subject to the Victorian Act.

The NSW case (*John Holland Pty Ltd v Inspector Nathan Hamilton*) gave rise to similar issues, except that the relevant State OH&S law was that of NSW. The prosecutions in issue arose out of alleged offences occurring in 2005.

The High Court decisions

The High Court interpreted s 4 as not preventing prosecutions under the State OH&S law for alleged conduct occurring before John Holland Pty Ltd became an 'employer' for the purposes of the Commonwealth OHS scheme and to which the Commonwealth scheme therefore did not apply. In reaching its decision in the Victorian case, the Court noted that the construction advanced by John Holland Pty Ltd would have 'absolved' those who become 'employers' under the Commonwealth scheme from liability to prosecution for earlier offences against a State OH&S law and that such a construction did not advance the purpose of s 4, which was to 'to relieve "employers" from the observance of the concurrent operation of multiple sets of legislatively imposed duties, whether imposed by State or Territorial law' ([25]).

AGS (Gavin Loughton and Simon Thornton from the Constitutional Litigation Unit) acted for the Commonwealth Attorney-General intervening, with the Commonwealth Solicitor-General Stephen Gageler SC and Chris Young as counsel.

Text of the decisions is available at:
http://www.austlii.edu.au/au/cases/cth/HCA/2009/45.html
http://www.austlii.edu.au/au/cases/cth/HCA/2009/46.html

Validity of South Australian liquor licensing laws; use of criminal intelligence

K-Generation Pty Ltd v Liquor Licensing Court

High Court of Australia, 2 February 2009
[2009] HCA 4; (2009) 83 ALJR 327; (2009) 252 ALR 471

The High Court unanimously rejected a challenge on *Kable* grounds to South Australian legislation restricting the disclosure in court proceedings of information classified by the SA Commissioner of Police as 'criminal intelligence'. In doing so it also considered what is a 'court of a State' for constitutional purposes.

The central issue in the case was whether s 28A(5) of the *Liquor Licensing Act 1997* (SA) infringes the principle identified in the case of *Kable v DPP (NSW)* (1996) 189 CLR 51 (*Kable*) that State courts be sufficiently independent and impartial so as to be suitable repositories for the exercise of the judicial power of the Commonwealth. Section 28A(5) directs the SA Licensing Court (or the Supreme Court on appeal), in proceedings under that Act, to 'take steps to maintain the confidentiality of information classified by the Commissioner of Police as criminal intelligence'. As French CJ noted (at [10]), s 28A(5):

> ... infringes upon the open justice principle that is an essential part of the functioning of courts in Australia ... [and] infringes upon procedural fairness [by authorising the Court] to consider, without disclosing to the party to whom it relates, criminal intelligence information submitted ... by the Commissioner of Police.

Despite this the High Court held that s 28A(5) 'did not operate to deny the Licensing Court the constitutional character of an independent and impartial tribunal' ([149]; see also [99], [258]), because:

> ... [p]roperly construed the section leaves it to the courts to determine whether information classified as criminal intelligence answers that description. It also leaves it to the courts to decide what steps may be necessary to preserve the confidentiality of such material. [10] (see also [143]–[147], [257].)

Further:

> ... the Licensing Court is not bound to accept in its terms the 'criminal intelligence' upon which the Police Commissioner relies. [148]

The High Court also unanimously rejected the contention made by at least one State intervener that the SA Licensing Court is not a 'court of a State' for the purposes of s 77(iii) of the Constitution and thus that the *Kable* principle does not apply to it. Features or characteristics of the Licensing Court relied on in concluding that it was a 'court of a State' for the purpose of the Constitution included that it:

Andrew Buckland
Senior Executive Lawyer
T *02 6253 7024* ***F*** *02 6253 7303*
andrew.buckland@ags.gov.au

Louise Parrott
Legal Officer
Constitutional Policy Unit
Attorney-General's Department

- was established as a 'court of record' entitled the 'Licensing Court of South Australia'
- was relevantly constituted by a District Court Judge
- exercised judicial power at least in some circumstances, including in matters within federal jurisdiction. ([115]–[127] and [132]–[134]; see also [83]–[86], [219]–[224].)

Finally, the Court stated that, had the *Kable* principle been infringed, the result would have been that s 28A(5) was invalid, and not (as some State interveners argued) that the Licensing Court would have ceased to be a 'court of a State' subject to the *Kable* principle. ([99], [153], [237])

AGS (Louise Parrott, then with the Office of General Counsel, and Andrew Buckland from the Constitutional Litigation Unit) acted for the Commonwealth Attorney-General who intervened, with the Commonwealth Solicitor-General Stephen Gageler SC and Chris Bleby as counsel.

Text of the decision is available at:
http://www.austlii.edu.au/au/cases/cth/HCA/2009/4.html

About the authors

David Bennett QC *leads the AGS constitutional litigation practice. He has advised the Commonwealth on constitutional law and policy issues for more than 25 years.*

Andrew Buckland *is the Senior Executive Lawyer in charge of the AGS Constitutional Litigation Unit. He has run a number of significant constitutional cases in the High Court and advises on constitutional and federal jurisdiction issues.*

Kathryn Graham *provides advice on constitutional issues particularly in relation to financial matters. She provides specialist advice to a range of Commonwealth clients on public finance matters including appropriations and the operation of the* Financial Management and Accountability Act 1997.

Adam Kirk *has expertise in constitutional law, statutory interpretation, finance law and energy law. He is currently seconded to the Department of Resources, Energy and Tourism where he is assisting in the development of national energy market reform.*

David Lewis *runs constitutional litigation in the High Court and other courts on behalf of Commonwealth agencies, particularly the Attorney-General's Department. He instructed in* Thomas v Mowbray *and* Roach v Electoral Commissioner, *and recently in* Clarke v Commissioner of Taxation *and* ICM Agriculture Pty Ltd v Commonwealth.

Gavin Loughton *specialises in constitutional and native title law. He also has extensive experience in workers compensation law, administrative law, contracts law, and litigation generally.*

Sacha Moran *specialises in constitutional law, offshore resources law and public finance law. He also has extensive experience in commercial litigation, with expertise in competition law.*

Louise Parrott *is currently with the Constitutional Policy Unit of the Attorney-General's Department.*

Simon Thornton *is a member of the AGS Constitutional Litigation Unit and has a range of litigation and commercial experience.*

AGS contacts

AGS has a team of lawyers specialising in constitutional litigation.
For further information on the articles in this issue, or on other constitutional litigation issues, please contact David Bennett QC or Andrew Buckland.

David Bennett QC
Deputy Government Solicitor
T *02 6253 7063* ***F*** *02 6253 7303*
david.bennett@ags.gov.au

Andrew Buckland
Senior Executive Lawyer
T *02 6253 7024* ***F*** *02 6253 7303*
andrew.buckland@ags.gov.au

For information on general litigation and dispute resolution matters and services, please contact any of the lawyers listed below.

Canberra	Jenny Anderson	02 6253 7401
Sydney	Greg Kathner	02 9581 7568
Melbourne	Susan Pryde	03 9242 1426
Brisbane	Barry Cosgrove	07 3360 5647
Perth	Graeme Windsor	08 9268 1102
Adelaide/Darwin	Katherine Bean	08 8205 4263
Hobart	Peter Bowen	03 6210 2104

Offices

Canberra
50 Blackall Street Barton ACT 2600

Sydney
Level 42, 19 Martin Place Sydney NSW 2000

Melbourne
Level 21, 200 Queen Street Melbourne VIC 3000

Brisbane
Level 12, 340 Adelaide Street Brisbane QLD 4000

Perth
Level 19, 2 The Esplanade Perth WA 6000

Adelaide
Level 18, 25 Grenfell Street Adelaide SA 5000

Hobart
Level 8, 188 Collins Street Hobart TAS 7000

Darwin
Level 3, 9–11 Cavenagh Street Darwin NT 0800

Web site
For a full review of AGS services, visit www.ags.gov.au.

Electronic versions of AGS newsletters are available for clients who prefer to receive issues in this form. Please contact 02 6253 7052 or email ags@ags.gov.au to arrange supply.

ISSN 1329-458X
Approved Postage PP 255003/05308